File: (b) (6) – Kansas City, MO Date: NOV 17 2017

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Duane Michael Hamilton, Esquire

ON BEHALF OF DHS: Mohammad Abdelaziz
Assistant Chief Counsel

APPLICATION: Reopening

This case was last before the Board on February 8, 2017, when we remanded proceedings to the Immigration Judge for preparation of a full decision. Presently, the respondent, a native and citizen of Kenya, appeals the Immigration Judge's June 14, 2017, decision denying her motion to reopen. The Department of Homeland Security (DHS) opposes the respondent's appeal. The appeal will be dismissed.

We review the findings of fact made by an Immigration Judge, including determinations as to credibility and the likelihood of future events, under a "clearly erroneous" standard. *See Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002); 8 C.F.R. § 1003.1(d)(3)(i); *see also Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015). We review all other issues, including issues of law, judgment, or discretion, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The record indicates that the respondent was admitted into the United States on (b) (6) 1999, as an F-1 student. On March 5, 2003, the respondent was personally served with a Notice to Appear (NTA) and placed in removal proceedings. On April 16, 2008, the respondent withdrew her applications for relief from removal and was granted voluntary departure until August 14, 2008. The Order of the Immigration Judge indicates that both parties waived appeal. The respondent did not depart as required and on August 3, 2016, the respondent filed a motion to reopen before the Immigration Judge seeking to apply for asylum claiming changed country conditions and a change in circumstances. To that end, the respondent maintains that she suffered Female Genital Mutilation (FGM) as a young child in Kenya and fears further harm upon her return. Also, the respondent claims that she stands to inherit property from her father and that she will be a victim of violence and witchcraft by family members who dispute her right to inherit and own the land that her father intends to give her. Further, the respondent argues that she fears harm at the hands of Al-Shabaab, an Islamist terrorist group, because of her (b) (6) faith. On August 19, 2016, the Immigration Judge issued an order denying the respondent's motion to reopen. In that order form, the Immigration Judge noted that the respondent had not established a "change of conditions or circumstances sufficient to overcome" her untimely filed motion. On September 14, 2014, the respondent appealed the Immigration Judge's decision and the Board remanded the record to the Immigration Judge for a full decision.

For the reasons stated in his June 14, 2017, decision, we concur with the Immigration Judge's denial of the respondent's motion to reopen. A motion to reopen must be filed within 90 days of the date of entry of a final administrative order of removal. 8 C.F.R. § 1003.23(b)(1). However, the 90-day deadline does not apply if the purpose of the motion to reopen is to apply for asylum relief and is based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and would not have been discovered or presented at the previous proceedings. 8 C.F.R. § 1003.23(b)(4); *Zeah v. Lynch*, 828 F.3d 699 (8th Cir 2016) (to override the 90-day filing deadline for a motion to reopen removal proceedings, the alien must prove changed country conditions, not a change in personal conditions); *Matter of S-Y-G-*, 24 I&N Dec. 247 (BIA 2007). In determining whether evidence accompanying a motion to reopen demonstrates a material change in country conditions that would justify reopening, the Board compares the evidence of country conditions submitted with the motion to those that existed at the time of the merits hearing below. *See Zeah v. Lynch*, 828 F.3d at 703; *Zhong Qin Zheng v. Mukasey*, 523 F.3d 893, 896 (8th Cir. 2008) (stressing that there must be material evidence of actual change in country conditions; *Matter of SYG* at 253. The parties do not dispute that the respondent's motion to reopen is untimely. Thus, the respondent's motion must satisfy the exception to the 90-day filing requirement.

The Immigration Judge correctly determined that the respondent did not show a change in country conditions in Kenya (I.J. at 2-4). The respondent's claim that she will be mistreated by her uncle because of a land dispute reflects a change in personal circumstances and a private family dispute rather than a changed country condition (IJ at 3).

Likewise, the Immigration Judge properly denied the respondent's motion to reopen based on her claim that she will be harmed by members of Al-Shabaab because of her (b) (6) faith (IJ at 4). As correctly noted by the Immigration Judge, the respondent provided evidence of recent issues in Kenya relating to Al-Shabaab. However, the respondent did not provide sufficient evidence of country conditions in Kenya at the time of her last merits hearing which would allow the Immigration Judge the opportunity to compare the country conditions that existed at the time of the merits hearing with the current country condition (IJ at 4). *See Zeah v. Lynch.*

Regarding the respondent's claim relating to FGM, we observe that the respondent had ample opportunity to seek asylum based on FGM prior to her 2008 hearing; however, the respondent failed to do so, accepted voluntary departure in 2008, and waived appeal. The respondent has not shown that she exercised due diligence in seeking to reopen her removal proceedings based on her FGM or any other claim for asylum. "In general, a filing period may be equitably tolled if the applicant seeking such relief demonstrates that he has exercised due diligence in pursuing his case during the period he seeks to toll." *See Habchy v. Gonzales*, 471 F.3d 858, 865 (8th Cir. 2006). Nonetheless, "[t]olling is an equitable doctrine, and it is not available to those who sleep on their rights." *Habchy v. Gonzales*, 471 F.3d at 866. Having considered the record in its entirety, we find that the Immigration Judge was correct in his determination and thus will affirm his denial of the respondent's motion to reopen. *See also Njie v. Lynch*, 808 F.3d 380 (8th Cir. 2015) (motions to reopen are disfavored in removal proceedings, where, as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States; accordingly, the movant bears a heavy burden to establish that proceedings should be reopened).

Finally, we decline to exercise our *sua sponte* authority favorably as the respondent has not established exceptional circumstances to merit reopening her removal proceedings. *See Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997) (the Board's power to reopen or reconsider cases *sua sponte* is limited to exceptional circumstances and is not meant to cure filing defects or circumvent the regulations).

Accordingly, the following order will be entered.

ORDER: The respondent's appeal is dismissed.

FOR THE BOARD